Supreme Court of the United States,

OCTOBER TERM, 1917

No. 178.

FIELDS S. PENDLETON,

Petitioner,

against

BENNER LINE,

Respondent.

BRIEF FOR PETITIONER.

E. HENRY LACOMBE,
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Counsel for Petitioner.

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Fields S. Pendleton, Petitioner, *against* Benner Line, Respondent.	

This cause is before the Court on a writ of certiorari, to the Circuit Court of Appeals for the Second Circuit (Record, page 330), to review its judgments against the petitioner and in favor of the respondent. (*Benner Line* vs. *Pendleton,* 217 Fed., 497) (Record, page 296.)

Statement of Facts.

On the 7th day of July, 1910, at New York City, the American schooner *Edith Olcott,* duly registered in the New York Custom House, was chartered outright for a voyage from the port of New York to San Juan, Porto Rico, to carry a cargo of lawful merchandise for the lump sum freight of $3,500 the owners furnishing the ship with officers and crew. The charter party was in writing (Record, page 11) and signed Pendleton Brothers, which was a co-partnership, wholly engaged in the ship brokerage business, composed of the petitioner and his brother. The charter party at the beginning recited:

> "This charter party made and concluded upon in the City of New York, the 7th day of July, 1910, between Pendleton Bros., Agents of the Schr. *Edith Olcott*, of the burden of 985 tons or thereabouts, registered measurements, now lying in the Harbor of Perth Amboy, of the first part, and the Benner Line, of the second part;
>
> Witnesseth, etc."

By what is shown in the evidence to have amounted to a mere incident of carrying on business, it occurred that the petitioner signed the co-partnership name Pendleton Brothers to the charter so made without question, on behalf of the ship and owners. The co-partnership owned none of the vessel, nor did the other member of the firm (the brother of petitioner). The co-partnership of ship brokers in due course of that business and for the usual commission, negotiated the charter party, and in usual course signed it, acting as clearly stated as agents on behalf of the schooner *Edith Olcott* and owners, that is to say all the owners, as the disclosed principals. The petitioner, however, was owner of nine-sixteenths (9/16ths) of said schooner, but did not have and there is nothing to show that in fact or in law he personally had part in negotiating the particular charter, or that in signing the firm name he acted in any relation except as a member of the co-partnership, Pendleton Brothers, which could not and did not pretend to act for any one soever except as agent for the ship and owners. There is no dispute of these facts, but the Circuit Court of Appeals said:

> "As the respondent (the petitioner here), the principal owner of the vessel *personally* signed *as his own agent,* he bound himself" (Record, page 306). (Italics ours.)

We are unable to see how the question of part ownership ever came into the case. It was the act of a co-partnership of brokers, and as such done for the named principals, to-wit, the ship and her owners, and is so stated and pleaded in Articles Second and Third of the libel. (Record, pages 2-3.)

The schooner received on board at the Port of New York a cargo of general merchandise, laden by the respondent Benner Line and bills of lading therefor were given by the respondent to various shippers, signed in its own name or by its procurement, or by one of the respondent's officers or by clerks in its office. These were in usual form of contracts of carriage. None of the bills of lading were signed by the petitioner. The lump sum freight reserved in the charter party has never been paid (Record, page 62). The respondent collected certain prepaid freight on cargo (Record, page 61) and by the terms of the bills of lading reserved to itself alone the freight to be paid on a proper landing of the remainder of the cargo at Porto Rico, or other port of destination, and insured its freight and profits on the contemplated voyage, and some of the shippers procured insurance on their goods (Record, page 60). The petitioner and the owners took out no insurance.

On or about the 30th day of July, 1910, the vessel broke ground and started upon her voyage, and on the 7th day of August, 1910, while at sea, was lost with all the cargo.

It has been found by the District Court and by the Circuit Court of Appeals for the Second Circuit that at the time the vessel started on her voyage she was in fact unseaworthy. As to this fact, the Circuit Court of Appeals said:

"We are forced to the conclusion, therefore, that as respects both her hull and her pumps, the vessel was not seaworthy when she began her voyage" (Record, p. 303).

The District Court found unseaworthiness as a fact at the beginning of the voyage:

"In my opinion, under these circumstances, the inference is irresitible that the pumps which failed were not fit to use when the ship started and that therefore the ship was not seaworthy at the beginning of the voyage" (Record, p. 290).

It is not open to dispute, however, that before the vessel entered upon her voyage she was thoroughly overhauled under supervision of a competent man, and due endeavor made by the owners to have her seaworthy in all respects, and it has been accordingly held by the District Court and the Circuit Court of Appeals that the unseaworthiness found, as above stated, was *wholly without the privity or knowledge of the petitioner,* and that petitioner had done everything in his power or that was brought to his knowledge to make the vessel seaworthy "and tight, staunch and strong, and in every way fitted for such a voyage." The finding on this question is expressed by the Circuit Court of Appeals as follows:

"It may be conceded in the case at bar that the respondent thought the *Edith Olcott* was in a seaworthy condition at the time she started on her voyage to Porto Rico" (Record, p. 299).

and by the District Court:

"In my opinion the schooner was not seaworthy at the beginning of the voyage, but such unsea-

worthiness was without the privity or knowledge of the owners" (Record, p. 291).

The above finding of fact in regard to unseaworthiness which we cannot but feel is not borne out by the record, and the finding of absence and freedom from privity or knowledge on the part of the petitioner as to which there is no question, will be accepted by this Court, and these questions of fact will probably not be re-examined, having been passed upon by two triers of the facts.

The *Carib Prince,* 170 U. S., 655;
The *Louisville,* 154 U. S., 657;
The *Abbottsford,* 98 U. S., 440.

Some considerable time after the disaster, the respondent, as bailee, not as charterer to recover a damage or loss of its own under the contract of charter but at the instance and for the advantage of underwriters who had paid losses thereon, filed a libel (Record, page 1) to recover the whole value of the cargo laden on board the schooner *Edith Olcott.* It was demonstrated upon the trial and is evidenced by stipulations found in the record that none of the cargo laden upon the schooner belonged to the respondent, nor was respondent interested therein as the absolute or a beneficial owner (Record, page 321).

The libel set up as the ground for recovery breach of contract in that the charter party provided that the schooner should be "tight, staunch and strong, and in every way fitted for such a voyage," and the claim is that the charter party was *his* personal contract and the *petitioner* had not furnished a seaworthy vessel at the beginning of the voyage in accordance with *his* contract with the Benner Line.

The petitioner interposed his answer, and, among other things, set up the defenses following:

> "Before and at the commencement of the voyage he exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, and if it shall in any way appear that the said vessel was not seaworthy at the commencement of the voyage or thereafter, that such unseaworthiness was without his privity or knowledge, and under the laws of the United States relating to the limitation of liability on the part of the vessel's owners, would be relieved of all liability growing out of the loss of said schooner, and if any liability on the part of this respondent does exist, it is limited to his proportionate part in said schooner as hereinbefore stated" (Record, page 8).

The trial in the District Court resulted, first, in dismissal without opposition of all claims against Pendleton Brothers, the co-partnership, and Edwin S. Pendleton, the respondent's partner. That Court, however, held that Fields S. Pendleton, impleaded as part owner, was entitled to limitation of liability under the provisions of the Act of Congress passed June 26th, 1884, limiting the "individual liability of a ship-owner to the proportion of any or all debts or liabilities that his individual share of the vessel bears to the whole" (Record, page 288, Decision of Holt, J.), and there was found to be no part of the vessel saved and no pending freight, and there followed final decree dismissing the libel (Record, page 292).

It is important to note that appeal was taken by the respondent only from that part of the decree which dismissed the libel as to Fields S. Pendleton (Record, page

293). The Circuit Court of Appeals reversed and directed that the District Court should decree *in solido* against him for all the damage suffered by the respondent as bailee of the cargo lost, denying the limitation provided by the laws of the United States in that behalf.

The Circuit Court of Appeals affirmed the finding of the District Court that the petitioner was *without* privity or knowledge as regards unseaworthiness of the vessel when she started on her voyage. The Circuit Court of Appeals based its decision upon the ground that the charter party, although signed as heretofore stated, by and in the name of a co-partnership of which the petitioner was a member, thereby was also the separate personal contract of petitioner and we must here hold in mind that by consent of Benner Line any right of claim against or liability of Pendleton Bros., the co-partnership who executed the contract, and also as to Edwin S. Pendleton, the other member of the firm, was relinquished and abandoned.

The Circuit Court of Appeals held that the petitioner was bound by his personal contract and was therefore not within the provisions or entitled to the relief accorded to a ship-owner or a part owner under any of the acts of limitation that had been passed by Congress. A portion of the opinion of the Circuit Court of Appeals is as follows:

> "If the particular contract is made by the shipowner in person, it is a matter of no consequence so far as the question now under consideration is concerned, whether it relates to and binds a particular vessel or not; by a personal contract we understand to be meant a contract made by the person or corporation to be bound, as distin-

guished from one imputed to such person or corporation" (Record, page 306).

The District Judge on this point, in dismissing the libel, had used the following words:

> "The charter party signed by Pendleton Bros. was a charter party of the particular Schooner *Edith Olcott.* Pendleton Bros. in signing that charter party, acted as agents of the owners. The agreement was the owners' agreement, chartering the schooner, and was an agreement made in the conduct of the schooner. Under such circumstances in my opinion the charter party cannot be regarded as the mere personal contract of Pendleton Bros.; it was the ordinary case of a charter party binding the vessel" (Record, p. 291).

In neither of the holdings nor in any contention that can be made on the point does the petitioner, Fields S. Pendleton, and the Benner Line appear in fact as having a direct personal contractual relation between each other. It is only, therefore, by imputation, quite aside from any act of the parties themselves, that this may be construed in any sense as the personal contract of Fields S. Pendleton, the petitioner, towards the Benner Line. The Benner Line wished to get and did get a charter of the vessel signed by her duly authorized agents, and *Pendleton Bros.* wished to give and did give such charter to the Benner Line. Our thought here in statement is that there never was any contractual relation between this petitioner, Fields S. Pendleton, and the Benner Line intended by either party, and that therefore any and all relations of the petitioner as an individual must come by imputation; and as to this there is no shadow of turn-

ing, throughout all the cases on the subject, that the statutes of limitation apply to relieve from such imputed connection and liability.

It will be hereafter shown that the judge who wrote this opinion (Holt, J.) also decided in the District Court the *Loyal* case, relied upon and referred to at length in the opinion of the Circuit Court of Appeals in this case.

Under the mandate of the Circuit Court of Appeals, the District Court appointed its commissioner, who after hearing the facts duly made his report, which was confirmed by the District Court, and there followed a final decree against the petitioner for the sum of $44,441.01, on July 22, 1915. From such final decree your petitioner appealed to the Circuit Court of Appeals for the Second Circuit, and upon motion of the respondent that Court dismissed the appeal without a hearing upon the merits, thereby holding that no question was presented other than already decided, and issued its mandate to the District Court, which Court rendered another final decree against the petitioner for the sum of $46,187.98 on March 14, 1916.

It is to review the two decrees of the Circuit Court of Appeals and to bring up the entire record of the proceedings of said Court that this writ of certiorari has been sought by the petitioner and granted.

Upon the petitioner's appeal, and in the record upon which it was based, there were stipulations (a) that the institution of the suit by the respondent, as bailee, was not at the request of the owners of any of the goods shipped and lost upon the schooner *Edith Olcott*, but solely at the request of the underwriters on the cargo, *i. e.*, underwriters who furnished insurance to the owners

of the cargo or to the respondent; (b) that all of the bills of lading representing the cargo of the schooner that were offered in evidence were signed by the respondent or its employees or by Edwin S. Pendleton and none were signed by the petitioner; (c) that the respondent owned no portion of the cargo shipped upon the schooner (Record, p. 320).

This record also contains a copy of the policy of insurance which was effected upon the cargo by various shippers and issued by the underwriters, who requested the bringing of this suit (Record, p. 321).

Two questions arise on the record:

First, does the Act of Congress, passed June 26, 1884, apply to the facts and circumstances found in this record so as to relieve the petitioner as a part owner in the ship from liability for the loss of the cargo of the Schooner *Edith Olcott?*

Second, may the respondent, Benner Line, suing not for any damages of its own but solely for the damages of others, as bailee, and, if it be of consequence, upon the request of underwriters of such other parties, maintain an action against a part owner of the ship for a breach of a charter party made with it, the Benner Line, and to which the third parties, on behalf of whom the Benner Line sues, were strangers?

FIRST POINT.

The Act of Congress passed June 26, 1884, entitled, "An Act to Remove Certain Burdens on the American Marine and Encourage the American Foreign Trade, and for other Purposes," applies to all debts and liabilities of a ship-owner, whether on contract or in tort, and is not limited to such contracts as are not personal contracts, and especially if such be made in the conduct of a vessel.

It had long been regarded a principle of importance to countries and nations capable of maritime adventure and investment, that these should be encouraged, and in the case of *The Rebecca,* Fed. Cases, No. 11619, Judge Ware questioned if the limitation obtaining on the Continent for so many years might not be regarded as a part of our own law; but, as this Court determined in the case of *The Lottawanna,* 21 Wall., 558, we approached and incorporated this by legislation; precisely as we have covered the subject of limitation of individual responsibility in corporations and as to secondary liability in such ownership, and more broadly in the relief and discharge of personal obligation and liability in the various acts of state legislatures and of the Congress in matters of bankruptcy where the original and the ultimate idea has been relief from personal obligation.

The latest and most comprehensive statement of this general idea of legislation by this Court is *Friend* vs. *Talcott,* 228 U. S., 37, where the Court held that as the Act extends relief generally a special creditor must bring

his claim within the excepting provisional terms of the general Act.

In 1851 our first statute was passed, found in Revised Statutes 4283 and following (now in Compiled Statutes 1916, Sec. 8021). This law provided matters of procedure which are not involved here and on the instant question provided in Sec. 4:

> "The liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It is open to argument that under this provision the condition of liability of a part owner depended on some personal, direct participation. Note the language giving freedom from obligation, from any loss or damage, without his "privity or knowledge." As in the present case it has on fullest consideration been held that whatever loss accrued to any person or interest was without the privity or knowledge of the petitioner, it would seem hardly necessary to go beyond the original law of 1851 to argue for reversal of the decree against him as a part owner of the ship.

We may for convenience quote this expression of the Court in the pioneer case *Norwich and New York Transportation Co.* vs. *Wright,* 13 Wall., 104:

> "The great object of the law was to encourage shipbuilding and induce capitalists to invest money

in this branch of industry. Unless they can be induced to do so the shipbuilding interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardness and personal daring and enterprise, but they have no capital. On the other hand, those who have capital and invest it in ships incur a very large risk in exposing their property to the hazards of the sea and to the management of seafaring men without making them liable for additional loss and damage to an inadequate amount. How many enterprises in many manufacturing and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability or from liability except to a limited extent?"

Again, as indictive of the fundamental idea involved in the particular legislation which we shall later trace in the enactment of the law of 1884, the Court said in *Providence and New York S. S. Co.* vs. *Hill Mfg. Co.*, 109 U. S., 578, at page 588:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interests, the value and importance of which to our maritime commerce can hardly be estimated, nevertheless, the practical value of the law will largely depend on the manner in which it is admistered. If the Courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before

stated) will be of the last importance. But if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisidictions."

The ship-owning interest of this country declined steadily, and among other reasons assigned were the responsibilities and liabilities assumed, and along with other cognate questions the particular subject was again dealt with by Congress in 1884. (Ch. 121, Vol. 23, Stat. at large, Sec. 57. Compiled Stat. 1916, Sec. 8028.) No man ever lived who tried to do more for American shipping than the father of this bill, Nelson Dingley. The spirit and the intent of the act was to help ship-owners and to remove all burdens that hindered capital from investment in shipping property. The record of the proceedings is illuminating. So much of the act as covers the question of liability is contained in the 18th section of the law, but it must not be overlooked that Sec. 30 repealed all laws and parts of laws in conflict with the whole Act. Sec. 18 dealing with this subject provided:

"The individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. Provided, that this section shall not affect the liability of any owner incurred pre-

> vious to the passage of this act, nor prevent any claimants from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship-owners."

The effect has come up in a number of cases to be regarded, however, in reference to the particular facts dealt with therein. In the cases are expressions that the later law may be regarded as an amendment to the Law of 1851; or again that the two are to be read as acts in *pari materia* and so read together as a whole; and throughout the cases the treatment is of Sec. 3 of law of 1851, and Sec. 18 of the law of 1884 without specific reference to the fact that Sec. 30 of the law of 1884 expressly repealed all laws and parts of laws in conflict with that Act.

It has not been decided by this Court that the act of 1884 when it refers to "any or all debts and or liabilities" and provides unequivocally that the individual libility of a ship-owner shall be limited, means that it must be without his privity or knowledge, or that a contract for the performance of a ship must not be personally made; or that the part owner of a ship by entering into a contract for her services becomes *in solido* liable to the performance of that contract at all events and regardless of the limitation of the statute. Such conditions have in more or less desultory way been read into the Act, out of which a somewhat uncertain doctrine has grown up that the Act of June 26, 1884, should be restricted in its meaning and not taken in its ordinary plain sense. There have been holdings that the act, or the contract, or the liability to be limited against must be without the privity of knowledge of the party seeking limitation, with some ameliora-

tion, as in case the act be done exclusively by the master and crew of the ship, or where a liability is imposed by operation of law. This, we submit, shows a tendency to what the Court admonished the lower courts not to do (109 U. S., at p. 588).

Cases arose where the party sought limitation against his personal engagement to pay money, on the faith of which repairs were made, supplies furnished or work, labor or services performed and rendered but when the question first appeared in a Circuit Court of Appeals upon a contract related to the ship and her operation, such as is involved in a warranty of seaworthiness, either expressed or included by operation of law, it was held that this was not a personal contract outside the purview and intention of the limitation law.

Quinlan vs. *Pew,* 56 Fed., 111.

Later the Sixth Circuit (*Great Lakes Towing Co.* vs. *Mills Transportation Co.,* 155 Fed., 11) held in reference to a general contract that it was a personal agreement between the parties and so outside the statute, and also laid down a rule of the limitation act to relieve the ship owner from the consequences of extraordinary risks imposed without the limitation by the law of the Admiralty; and defined these as risks arising from the conduct of and contracts made by those who are beyond the personal supervision and control of the owner; yet having legal authority to bind the owner to answer for their conduct or contracts; but where the contract was made directly by the owner, the statute did not apply. Since this decision, however, this court has held that the limitation applies to all contracts or torts, whether imposed by the law

of admiralty or not (*Richardson* vs. *Harmon,* 212 U. S., 96).

The Circuit Court of Appeals for the Second Circuit followed the narrowing and restrictive construction of the Sixth Circuit and in the case of the *Loyal,* 204 Fed., 930, held that a ship owner was not entitled to a limitation of liability for breach of a personally made contract even though that contract respected the conduct of a vessel to be performed by her. But that also was a case where no particular vessel was named or involved in the contract, unlike the case at bar where the particular ship was chartered. The Circuit Court of Appeals in the case at bar based its decision squarely upon its previous decision in the *Loyal* case.

The whole subject was up for full consideration by the Congress in 1884. The natural, the necessary, difference of opinion was, before Congress, expressed in debates for which we may claim nothing except to show the interest, the trend of thought and the character of question considered by those on whom was imposed the duty of solution. We have, however, the definite action of the committees including the Conference on the exact point here involved. These brought out the question with iteration and reiteration whether, in removing the conceded and self-evident still existing burden as determined to be in furtherance of a desired public benefit and interest, the condition imposed by the inadequate act of 1851 was necessary or advisable and whether it should be retained or repealed and a law established without such qualification or condition.

Excluding, if we must, everything in the nature of debate, we find in those proceedings of the legislative body

which we may undoubetdly consult, clear and definite rejection of such restriction, and, accordingly, in the Act of 1884 clear, positive limitation of liability without condition, and made more manifest, if that were necessary, by express repeal of any laws and parts of laws in conflict.

The value which this Court gives to the report of a Congressional Committee, as an aid to construction, is very clearly brought out in the case of the *Church of the Holy Trinity* vs. *United States,* 143 U. S., 464.

While the case at bar does not depend wholly on our first point but presents other considerations which might properly impel a decision here in favor of the petitioner, we advance the proposition that the law of 1884 is not by way of amendment of the law of 1851; that it is not necessary to read the two statutes together as forming each a part of a whole, but that the statute of 1884 is sufficient in itself, and covers, defines and governs the right of limitation of liability and stands as the last expression of the Legislature and by Sec. 30 expressly repeals everything in conflict on the subject of the right which had preceded.

We are aware that this would exclude the "privity or knowledge" feature of the law of 1851; and if there be doubt about the intent of the law-makers, we have the state of the law under the Act of 1851, the Title of the Act of 1884, the action of the Committees and the reasons and basis furnished therein, and the amendment proposed and deliberately rejected by the conference committee at the instance of the House members and thereupon receded from by the Senate, is of the most important interest. The language was, "incurred without his personal consent or privity."

Our proposition is that the Act of 1884, in respect of the character and extent of the limitation does not by amendment or correlation add a new element; but in broad terms it positively fixed the limitation and eliminated the condition as to privity or knowledge and even personal consent and, repealing everything inconsistent with the Act of 1884, grants the exemption unequivocally as to every liability of the ship-owner as such, all, of course subject to the proviso of the law of 1884 in relation to liabilities incurred before the passage of the act and certain contracts of employment of sailors. Indeed, the proviso saving from the operation of the statute previously incurred liability and those of a certain character which might thereafter be entered into, is persuasive as a vital consideration here. (See *Friend* vs. *Talcott,* 228 U. S., 37).

This brings us to a more specific consideration of the law of 1884. We are not unmindful that in *Richardson* vs. *Harmon* the Court spoke of the absence of intent to repeal but we respectfully submit that the point was not involved and was not argued in that case. Sec. 18 of the Act of June 26, 1884, was an amendment inserted in a bill that had previously passed the House, afterwards known as the Dingley Bill. Separate bills were introduced in the House and Senate. On February 8th, 1884, Senator Frye of Maine introduced S. 1448 by direction of the Committee of Commerce. On January 7, 1884, Mr. Dingley of Maine introduced H. R. 2228. The House Bill was passed April 26, 1884, and went to the Senate. The Senate Bill was debated and amended in various particulars so that at its final passage it included Sec. 18 as hereinbefore quoted, except that it had inserted the words "incurred without his personal consent or privity."

This, as the record shows, became the real subject of consideration and after the two bills hereinbefore referred to had been passed by both houses, there being differences between the bills, a conference was required and had. The records of Congress show that the question was whether this language, "incurred without his personal consent or privity," should be retained as a part of our legislation defining and limiting the liability of a ship owner and aside from the general debate on the subject the report of the conference is found in Vol. 15, Congressional Record at papes 5440-5452:

> "Mr. Frye submitted the following report, that the House recede from its disagreement to so much of amendment numbered 4 as proposes a new section numbered 18 and agree to said section as proposed by the Senate with an amendment striking out the words 'incurred without his personal consent or privity' in the first and second lines, and the Senate agrees to the same."

In reference to this action and as evidencing the intent we quote the language of Senator Frye upon the introduction of the bill and upon a following day when it was fully debated in the Senate:

Vol. 15 Cong. Rec. 976.

> "Mr. Frye: Section 18 limits the invidual liability of a ship-owner for any and all debts and liabilities to the proportion that his individual share of the vessel bears to the whole. That is not so great a change as appears on the face of the law. By statutes to-day any shareholder in a vessel is liable for no more than the value of the share for any tort of the master or in case of collision or in any other way except by contract.

But those provisions of the law are not generally understood. They follow the English and the French law almost word for word. There is to-day a feeling among the capitalists of this country that it is exceedingly dangerous to put capital into a ship where there may be twenty owners and only one of them really a man of wealth, and he responsible for the entire debt contracted. The English have the same limited liability provided for in this section, only in another form. They have a general law of 'limited liability' by which any dozen men desiring to build a ship or a steamer can simply incorporate themselves for that single purpose and then their liability under that act of incorporation shall be the owner's share of the vessel and no more. The bill which we report does the same thing, only in another form. It is believed that it will remove a difficulty under which our capitalists have labored, will give them courage to invest in ships, and will do a great deal more towards encouraging shipbuilding and ship-owning than really the law itself which we report would authorize."

"Mr. Frye: Section 18 touches the individual liability of ship-owners. To-day, except as otherwise provided by statute, in case of collisions, torts, embezzlements, etc., the American ship-owners are simply co-partners. A dozen in the ownership, each a twelfth, or more or less, as ships are owned in our country, are co-partners in the law, and in any contracts that are made, no matter what they may be, each one is held for the whole. This deters many men of wealth from undertaking to build ships. It will be remembered that we are not co-partners in the ordinary association of such. It will be remembered that my share of the ship can be disposed of without the consent of the others. At any day, at any moment,

> I can register the bill of sale, and I am no longer a member of the co-partnership, and so every share of the ship may be disposed of without the consent of the other owners. It must be understood, too, that we have no more control of our ships as ship-owners than the stockholders in a great factory have; not so much, because our ship is out of our sight three-fourths of the time. We relieve stockholders in these corporations from any liability beyond their stock simply because they are conducted by agents and superintendents; but your ship is controlled by agents and superintendents, and those ships are out of your sight and out of your reach for months at a time. I believe that that liability should be limited, and it will be a great inducement and encouragement to men of wealth to invest in ships."

and also the remarks by Senator Warner Miller of New York addressed directly to the amendment proposed by Senator Frye to insert the words "without his consent or privity":

Pages 3970-3971.

> "Mr. Miller of New York: This a remarkable change. As I understood the sentiment of the committee, it was really to make the ownership in all sea-going vessels a limited liability company in which every individual was liable for only his share. That was notice to the whole world that nothing but the ship was holden. Now, you are going to bring in a clause which would lead to interminable litigation, for some of the owners of the ship will be engaged in the management they will know in regard to the affairs, and they will be held personally liable for everything, while other owners not immediately connected with the

management will escape. The burden will all fall on one or two men, if there is any burden.

"It seems to me that in order to encourage the investment of capital in ship owning we have to do substantially this: We have to make each ship company a limited liability company, and that is notice to everybody. If that is understood to be our law everybody who trusts a ship does it with a full knowledge that there is nothing back of it save the ship itself. Therefore no injustice will be done to anyone. But if the amendment of the Senator from Maine prevails there will be two classes of owners of ships; one class who will have control of the management, will be responsible for everything; and the other class will then take the position of silent partner and will not be responsible."

And it follows that the House refused and the Conference Committee refused the qualification "incurred without his personal consent or privity," and the act of 1884 was passed after full consideration as we find it, after the limitation was clearly and definitely rejected.

This is made the more emphatic by the repealing section 30, and we respectfully submit that such qualification may not properly be judicially read into the plain lines of the statute. (We annex to our brief as an appendix all the debate in the Senate).

This case presents a feature of the law providing limitation of the liability of a ship-owner, for the first time, for decision by this Court. The first act of limitation was enacted 76 years ago (1851), and the one here involved, thirty-three years ago (1884), and yet the question whether or not a ship-owner who has personally made a contract for the working of his ship is entitled to

any relief under these acts has never been directly before this Court. Assuming, but by no means admitting, that such a personal contract is shown to have been made by the petitioner, the question is now here.

It is necessary to clearly see what and what only is the Act to be applied. For years, the Courts below have proceeded upon the assumption that in enacting section 18 of the Act of 1884, the Congress merely intended to include contracts in the general scheme of limitation of liability and did not otherwise change the existing law. Until quite recently it was held by the lower Courts that the two acts read together, applied to Maritime torts and contracts only. But *Richardson* vs. *Harmon* did away with that holding and decided nothing else. No other question was involved. Quite recently, it has been suggested (*The Benjamin Noble,* 244 Fed., 95), that the Act of 1884 was a complete enactment in itself and repealing the Act of 1851, covers the whole subject of limitation of liability of a ship-owner for torts and contracts on land and sea.

The Act of 1884 we believe was passed by Congress to do just what its title says, to remove certain *burdens* and to *encourage,* and it was deliberately passed having in view more than 30 years of the workings of the act of 1851. That Act had been given a long trial and been found wanting. Shipping was steadily declining. The Congress determined to remove certain known *burdens* and to go farther and encourage. Just as when in 1898, the general business of the country was suffering under the insolvency laws of the States since the expiration of the Bankruptcy Act in 1871, the Congress came to the relief of business and removed the burden of the various

and varied State Laws and encouraged business by enacting the General Bankruptcy Act of that year, so in 1884 Congress passed this section 18. It was a relief act. Just as the Bankruptcy Act provides that any and all provable debts of the bankrupt shall be limited to his assets, so the act of 1884 provides that *any* or *all liabilities* of a ship-owner shall be limited to his assets in his vessel. The Bankruptcy Act has never been held to apply only to *imputed* contracts and torts suffered without the bankrupt's privity or knowledge, yet the words used as indicating from what the bankrupt may be relieved of are provable *debts,* words much less in meaning than *any* or *all* liabilities. Statutes of limitation and of Bankruptcy are intended for relief, they are both acts of relief and to remove burdens and encourage enterprise.

As has been said before, when the Congress in 1884 approached the subject of relief from burdens and encouragement to ship-owners, it had in view the inadequancy of the act of 1851 to accomplish that purpose. The act of 1851 relieved only against torts and only such torts as were suffered without the owners privity or knowledge. In other words, *personal* torts were outside that law, and such partial relief had failed, American shipping was declining. Is it fair to suppose that the mere inclusion of contracts, and only such contracts as were incurred without his privity or knowledge would revive shipping? This question is completely answered when we learn the intention of Congress from the source that this Court has said it can be learned, its journals and records. Those show, unmistakably, that it was the deliberate intention of Congress to remove from the limitation laws relating to ship-owners, any and all questions

of consent, privity or knowledge, and to go farther and repeal the law of 1851 which, after a long trial, had signally failed of its purpose.

SECOND POINT.

The respondent has no standing in law to maintain this action as bailee.

This action brought by the Benner Line is based upon the written charter party. The Benner Line is suing solely as bailee, in other words, as Trustee for the shippers of the goods lost. It is not attempting to enforce any liability or collect any damages for any loss suffered by itself. It had no loss, but on the contrary made money by the loss of the *Edith Olcott* (Record, p. 62). Bearing in mind that it is suing as bailee or trustee upon the charter party, the question first arising is, who were the parties to the charter party? There can be no question but that the two parties were the schooner *Edith Olcott* and the Benner Line. We therefore have this case prosecuted by the Benner Line for the benefit solely of third parties who had no connection whatever and were strangers to the instrument in writing sued upon. The only instrument in writing which connects the shipper of the goods with the schooner *Edith Olcott* is the bill of lading which admittedly was not signed by this petitioner. That being the case, it would seem that the Benner Line cannot maintain this action. The charter party expressly stipulates that bills of lading are to be signed without prejudice to the charter (Record, p. 11). Therefore the

bills of lading are separate instruments and independent contracts between different persons than those executing the charter party.

> "A bailment is a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored to the bailee as soon as the purpose of the bailment shall be served."
>
> *In re Allen,* 183 Fed., 172.

The question then arises to whom the goods shipped on board the *Edith Olcott* and subsequently lost, were delivered "in trust."

A good test would be who gave the trust receipt. The bill of lading was unquestionably such a receipt and the respondent was very careful that such bills of lading should be signed or purported to be signed by the master or agents of the vessel and not by the respondent. The vessel then was the bailee of the cargo—there were not two bailees at the same time. It was the owners of the ship, not the respondent, that took the goods "in trust" to transport to Porto Rico and then restore them to their owners or their assigns. It was the owners that agreed to do the transporting for the charter money, not for the freight money that the respondent charged. The respondent was a broker acting for the shippers, and it discharged its duty to the goods and the shippers when it delivered them "in trust" to the vessel and got from the vessel and delivered to the shippers a receipt and contract of carriage or, as it is called, a bill of lading.

If the respondent can maintain any action against the

vessel or her owners it must be as trustee upon request and then its recovery as such trustee would be limited to a recovery of only so much as their *cestui que trust* was entitled to.

> "It may be regarded as elementary that when a plaintiff sues in a representative capacity, and for the benefit of another—that is, as trustee for the *cestui que trust* or as bailees for the bailor—his right of action and extent of recovery must be confined to the right of the party for whose benefit he sues."
>
> *U. S.* vs. *Atlantic Coast Line,* 206 Fed., 190, at page 202.

The bills of lading issued herein for the transportation of the cargo of the *Edith Olcott* were contracts and were the contracts of the Schooner, not of Benner Line, which owned, no vessel.

> "A bill of lading is a contract to transport and deliver goods to the consignee upon the terms therein specified."
>
> *John Vitucci Co.* vs. *Canadian Pac. R. R. Co.,* 238 Fed., 1005.

> "Such an instrument (a bill of lading) is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt, a bill of lading, in the usual form is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated."

The Delaware, 81 U. S., 579, at page 601.

> "A bill of lading has a two-fold character. It is a contract to transport and deliver the goods to the consignee upon the terms specified in it; and it is also a receipt as to quantity and description of the goods shipped. So far as it embodies the terms of the contract it is not to be varied by parol evidence."

Vanderbilt vs. *Ocean S. S. Co.,* 215 Fed., 886.

It will be seen by the above citations that the bills of lading were not only "trust" receipts for the cargo, but they were also the agreement with the shippers and owners of the cargo for the transportation and delivery. They were not Benner Line's agreements, they were the schooner's agreements. The only thing the Benner Line had to do with the cargo was to receive it on a dock, protect it if necessary to prevent damage while on the dock, deliver it to the schooner *Edith Olcott,* get the receipt and turn it over to the shipper, receive the freight money from the shipper either at the time of the delivery of the bill of lading or at the time of the delivery of cargo. It may have been the legal bailee during the short period that the cargo was on the dock awaiting its loading into the schooner, but just as soon as the goods went on board the schooner Benner Line gave up possession to the schooner, and the schooner became the bailee of the cargo and responsible for the delivery. All the shippers asked the Benner Line to do and all that Benner Line did was to receive that cargo, protect it until it could be loaded in a vessel and give to the shippers a good receipt and contract of carriage by the vessel. This Benner Line did and then as to the goods they became *functus officio.*

But this action was begun at the request of insurance companies—no shipper requested it, therefore no shipper would be liable for any of the expenses, or hoped, or wanted to reap any of the rewards. Yet as the judgment stands Benner Line have not onlly recovered the loss or claim of the requesting insurance companies but the loss or claims of the non-requesting shippers. The bills of lading are still outstanding in the hands of the shippers. The contracts are still enforceable.

The decrees herein of the Circuit Court of Appeals for the Second Circuit should be reversed and the cause remanded to the District Court with instructions to decree a dismissal of the libel with costs to the petitioner, in all Courts.

E. Henry Lacombe,
Harvey D. Goulder,
Avery F. Cushman,

APPENDIX.

H. R. No. 2228 (Congress of Years 1883-1884)

> "Although debates may not be used as a means of interpreting a Statute, that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is the history of the period when it was adopted."
>
> *Standard Oil Co.* vs. *U. S.,* 221 U. S., 50.

Entitled, "An Act to remove certain burdens on the American Marine and encourage the American foreign carrying trade and for other purposes" was introduced on January 7, 1884, by Nelson Dingley, Jr., of Maine and referred to the Select Committee on Ship Building and Ship Owning, of which Mr. Dingley was a member. January 9th, 1884, the bill was reported from the Committee with amendments.

April 26th, 1884, the bill was debated and passed. The report of the Committee was read.

June 23rd, 1884, the Conference report (of which Mr. Dingley was a conferee) was adopted by the House and the bill passed and signed by the Speaker.

S. 1448

Bill, under the same title as in the House, was introduced on February 8, 1884, by Senator Frye of Maine, who stated that he introduced it by the direction of the Committee on Commerce.

On various days thereafter the bill was debated in the

Senate, and the Senate finally asked for a conference with the House. The conference was granted.

June 21, 1894. The Conference report was adopted and the bill passed by the Senate. The bill as passed by the House did not contain Section 18 (referring to limitation) and this section as passed by the Senate had the words "by his consent or privity" inserted. The Conference report accepted Section 18 as an amendment of the Senate but struck out the words "by his consent or privity," leaving the Section as it is now.

Senator Frye of Maine took charge of the bill in the Senate and there is hereafter given an extract from the Congressional Record, showing what took place in the Senate and in conference between the two Houses, and the final passage by both Houses (Vol. 15, Congressional Record, page 976):

> "Mr. Frye: Section 18 limits the individual liability of a ship-owner for any and all debts and liabilities to the proportion that his individual share of the vessel bears to the whole. That is not so great a change as appears on the face of the law. By statute today any shareholder in a vessel is liable for no more than the value of the share for any tort of the master or in case of collision or in any other way except by contract. But those provisions of the law are not generally understood. They follow the English and the French law almost word for word. There is today a feeling among the capitalists of this country that it is exceedingly dangerous to put capital into a ship where they may be twenty owners and only one of them really a man of wealth, and he responsible for the entire debt contracted. The English have the same limited lia-

bility provided for in this section, only in another form. They have a general law of 'limited liability,' by which any dozen men desiring to build a ship or a steamer can simply incorporate themselves for that single purpose and then their liability under that act of incorporation shall be the owner's share of the vessel and no more. The bill which we report does the same thing, only in another form. It is believed that it will remove a difficulty under which our capitalists have labored, will give them courage to invest in ships, and will do a great deal more towards encouraging shipbuilding and ship-owning than really the law itself which we report would authorize."

At page 3650:

"Mr. Frye: Section 18 touches the individual liability of ship-owners. Today, except as otherwise provided by statute, in case of collisions, torts, embezzlements, etc., the American ship-owners are simply co-partners. A dozen in the ownership, each a twelfth, or more or less, as ships are owned in our country, are co-partners in the law, and in any contracts that are made, no matter what they may be, each one is held for the whole. This deters many men of wealth from undertaking to build ships. It will be remembered that we are not co-partners in the ordinary association of such. It will be remembered that my share of the ship can be disposed of without the consent of the others. At any day, at any moment, I can register the bill of sale, and I am no longer a member of the co-partnership, and so every share of the ship may be disposed of without the consent of the other owners. It must be understood, too, that we have no more control of our ships as ship-owners than the stockholders in

a great factory have; not so much, because our ship is out of our sight three-fourths of the time. We relieve stockholders in these corporations from any liability beyond their stock simply because they are conducted by agents and superintendents; but your ship is controlled by agents and superintendents, and those ships are out of your sight and out of your reach for months at a time. I believe that that liability should be limited, and it will be a great inducement and encouragement to men of wealth to invest in ships.

Mr. Brown: To what is the liability limited?

Mr. Frye: To the extent of the amount owned, the same as in a corporation."

At pages 3970-1:

"Mr. Frye: I move to amend Section 18 by inserting in the first line of the section, after the word 'ship-owner,' the words 'incurred without his personal consent and privity.'

Mr. Hoar: How will it read then?

The Chief Clerk: That the individual liability of a ship-owner, incurred without his personal consent or privity, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole.

Mr. Miller, of New York: This is a remarkable change. As I understood the sentiment of the committee, it was really to make the ownership in all sea-going vessels a limited-liability company in which every individual was liable for only his share. That was notice to the whole world that nothing but the ship was holden. Now, you are going to bring in a clause which would lead to interminable litigation, for some of the owners of the ship will be engaged in the management, they will know in regard to the affairs, and they will

be held personally liable for everything, while other owners not immediately connected with the management will escape. The burden will all fall one one or two men, if there is any burden.

It seems to me that in order to encourage the investment of capital in ship owning we have to do substantially this: We have to make each ship company a limited-liability company, and that is notice to everybody. If that is understood to be our law everybody who trusts a ship does it with a full knowledge that there is nothing back of it save the ship itself. Therefore no injustice will be done to anyone. But if the amendment of the Senator from Maine prevails there will be two classes of owners in ships; one class, who will have control of the management, will be responsible for everything; and the other class will then take the position of silent partner and will not be responsible.

Mr. McPherson: Will the Senator from New York yield to me for a moment?

Mr. Miller, of New York: Certainly.

Mr. McPherson: Let us carry out the proposition of the Senator from New York to its logical conclusion. Suppose, for instance, two ships on the ocean or in the port of New York sail about the harbor or elsewhere. One of them collides with the other, is entirely at fault, and both ships are sunk. How are the injured owners of the ship that has been sunk by reason of the fault of the other, which is also sunk by the same collision, to get redress? Where are they to seek redress? I ask the Senator from New York that question.

Mr. Miller, of New York: I beg the Senator's pardon; my attention was distracted and I did not hear his question.

Mr. McPherson: I will state it again. Where

two ships collide and one ship is at fault and both are sunk in the collision, I wish to know where redress is to be sought. Suppose the ship not at fault is worth six times as much as the other, where is the redress?

Mr. Miller, of New York: There will be no redress beyond the value of the ship.

Mr. McPherson: The ship is sunk; what is her value then?

Mr. Miller, of New York: She would get the marine insurance, I suppose.

Mr. McPherson: Suppose she is not insured?

Mr. Sherman: It seems to me that this is a much more important matter than the Senator from New York thinks. If somebody has been at fault in the management of a ship, there ought to be a liability certainly to the full extent of the man's property. There ought to be a liability criminal as well, and there ought to be a liability personal to fully cover the value of the ship lost. If this bill is in a condition where there is no liability for torts or wrongs committed by the managers and controllers of a vessel, I think it is an important consideration. For the ordinary hazards of the sea, for the ordinary accidents of life, the owners of a ship may not be held responsible; but if accidents and torts have been brought about by their wrongful action, they ought clearly to be responsible. It seems to me that if the bill does not provide for that, it ought to be amended.

Mr. Miller, of New York: For any wrong committed, any negligence, or anything of that kind, the parties would, of course, be held liable under the law. This does not affect that in my judgment.

Mr. Conger: This provision in the bill follows the usual law of all the European nations, that in

the case of damage to a vessel the party without wrong of his own shall be liable only for the value of the vessel and the freight.

Mr. Sherman: Suppose a tort?

Mr. Conger: This provision does not apply to that.

Mr. Hoar: Will the Senator pardon me while I read a sentence from the Revised Statutes?

> 'Sec. 4282. The liability of the owner of any vessel, for any embezzlement, loss, or destruction by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.'

The liability is not to the valule of the vessel, but it is he value of the interest of such owner.

Mr. Conger: The owner's interest is the interest in the value of the vessel before the damage was committed. That has been so construed by the courts universally. It is the interest in the vessel just prior to the time when the collision took place.

Mr. Hoar: Now, if the Senator will pardon me, this section is 'That the invidual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities'—not the particular debt, but all existing debts or liabilities—'that his individual share of the vessel bears to the whole.' Is not that an almost impossible burden

to put upon the claimant to prove the individual interest? Is he to have the duty of ascertaining how many debts there are and what proportion this man's interest bears? Is there any such rule as that?

Mr. Conger: Would it not be unjust to the owner if he should be mulcted over and over again, beyond the value of his interest?

Mr. Hoar: Then abolish individual ownership altogether.

The President *pro tempore*: Senators will please suspend. The Chair thinks it his duty to remind the Senate that by unanimous consent debate was to terminate at 5 o'clock on this bill and amendments. The question is on the amendment proposed by the Senator from Maine.

* * * * * * *

Mr. Vest: The intent is to protect the shipowner when the captain is in control of the ship thousands of miles away. We did not suppose he should give bonds to the extent of a million of dollars, but only to the amount of his proportionate interest or ownership in the vessel, and of course as he is there individually and knows where the damage is committed and is a party to it, he ought to be held to the full amount of the damages.

Mr. Miller, of California: Why is not the provision in the Revised Statutes as it stands now sufficient?

Mr. Vest: It does not apply to contracts at all, only to torts."

Referring to the Congressional Record, pages 3972-3, in H. R. bill 2228, we find the first nine sections of the act to remove a burden from American shipping was identical with Senate bill 1448. The Senate amended H. R.

2228 by striking out certain sections of the House bill and amending it by inserting certain sections of the Senate bill, one of which was Section 18, as reported upon by the committee, as herein quoted.

At page 3974 the Senate passed Senate Bill 1448, House Bill 2228, as amended by the Senate. The bill as passed was then referred to conference committees of both houses.

At page 5440, a message from the House of Representatives, by Mr. Clark, its Clerk, announced that the House had concurred in the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate bill (H. R. 2228) to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade.

Mr. Frye submitted the following report: "That the House recede from its disagreement to so much of amendment number 4 as proposes a new section numbered 18, and agree to said section as proposed by the Senate with an amendment striking out the words "incurred without his personal consent or privity," in the first and second lines"; and the Senate agree to the same.

At page 5452, it will be noted that a proposition was made by Senator Frye to include the words "incurred without his personal consent or privity," and that proposition to so amend section 18 failed and the bill was passed by both houses in the form hereinbefore quoted.

INDEX.

LIST OF CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 178.

FIELDS S. PENDLETON,
Petitioner,

AGAINST

BENNER LINE,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

This action was brought for breach of a charter party whereby the schooner *Edith Olcott* was let to respondent for a voyage from New York to San Juan, Porto Rico. Although the charter party was stated to be made—

> "between Pendleton Bros., agents of the "schooner"

and this respondent, and was signed in the name of "Pendleton Bros.," it was actually negotiated and physically signed by the petitioner, Fields S. Pendleton, who was a member of the partnership of Pendleton Brothers and the owner of 9/16th of the schooner. The statement on page 2 of the petitioner's brief that the petitioner—

> "did not have, and there is nothing to show that in fact or in law he personally had part in negotiating the particular charter,"

is a clear error. The petitioner testified (Record, fol. 395):

> "A. I think I signed the charter party; my recollection is that I made the contract and the terms and everything with Mr. Callaghan, and I think, I am quite positive, I signed it."

It is undisputed that this charter party was made on behalf of the owners of the schooner; that the petitioner himself owned the majority of the shares and was the managing owner (Record, fols. 388, 398); and petitioner's own testimony shows that he personally negotiated and signed the charter.

The vessel, with her cargo, having become a total loss, this respondent, as charterer of the vessel and bailee of the cargo, brought this action to recover for the value of the cargo. The action was brought at the request of the underwriters on the cargo, who had paid the cargo owners and become subrogated to their rights (Opinion of the District Court, fol. 449; Commissioner's Report, fol. 493; Stipulation, fol. 512).

Both the District Court and the Circuit Court of Appeals held that the *Edith Olcott* was unseaworthy when she set out on her voyage. The District Court held that, as the petitioner did not appear to have been guilty of any personal fault, he was entitled to limit his liability; but the Circuit Court of Appeals rejected his claim for limitation because of the fact that the petitioner had himself personally signed the contract of char-

ter party which contained an express and unqualified agreement that—

> "the said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage * * *" (Record, fol. 19.)

The suggestion on page 5 of petitioner's brief that there is no question as to his "freedom from privity or knowledge," and that this issue has been decided in his favor by both of the lower courts, is a clear error, as appears from the opinion of the Circuit Court of Appeals.

The petitioner's brief raises only two issues, and we shall confine ourselves to answering these. We understand the petitioner to concede that this Court will not reconsider questions of fact with respect to which both of the lower courts have agreed.

So far as the facts are material, they are fully and accurately stated in the opinions of the lower courts, to which we refer.

POINT I.

The Act of Congress of June 26, 1884, is to be construed as an amendment to the Act of March 3, 1851, and subject to the same limitations and qualifications expressed in that Act; and neither of these Acts has any application to the present case.

In the First Point of his brief, petitioner argues that the Act of June 26, 1884, was intended to repeal the Act of March 3, 1851; and that the limitation of liability afforded by the later Act

is not dependent upon the absence of any privity or knowledge on the part of the shipowner.

This question was carefully considered by this Court in the case of

Richardson v. *Harmon* (222 U. S., 96).

In that case this Court considered the earlier decisions and also the record of the proceedings in Congress, upon which the petitioner lays so much stress in the present case. We quote from the opinion of this Court, as follows (pp. 102, 103):

> "The meagre debate which occurred upon this section of the act—an act which included many other matters concerning the shipping interests of the country—if competent at all, throws little or no light as to the meaning which was supposed to be attached to liabilities, as distinguished from claims arising out of contract. There does appear, however, a broad general purpose to put a shipowner in the status of one whose risk on account of obligations arising from the conduct of the master and crew is confined to his proportionate interest in the ship and her freight. No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that law to cases not before within it, that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law."

After a full review of the authorities, this Court held that the Act of June 26, 1884, was to be construed as an amendment of the existing law, and not as a repeal of the qualifications contained in the Act of March 3, 1851.

It may be true that this question was not strictly necessary to the decision in *Richardson* v. *Harmon;* but it was the principal question considered and decided, and we feel that we can add nothing to the opinion of this Court in that case.

The substance of petitioner's argument is that, in *Richardson* v. *Harmon,* this Court did not give sufficient weight to the debates in Congress and the proceedings of the Conference Committee with respect to the Act of 1884. The opinion of this Court indicates, on the contrary, that these proceedings were carefully considered. Moreover, it is well settled that such proceedings cannot be considered as a means of interpreting statutes.

> *U. S.* v. *Trans-Missouri Freight Ass'n,* 166 U. S., 290 at p. 318, and cases cited.

The situation presented in that case was very similar to the situation in the present case. The fact that amendments to the Act of July 2, 1890, expressly including transportation, had been rejected, was cited in support of the defendants' argument that this subject-matter was not intended to be included in the Act as finally passed. This argument was rejected for the reasons stated in the opinion (pages 318, 319).

The *Freight Association* case is interesting also in another aspect. After reviewing the history of the Act under consideration, this Court said (at page 318):

> "All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this Act, as we determine the meaning of other acts, from the language used therein."

This language very aptly describes the situation in the present case. An examination of the debates contained in the appendix to petitioner's brief discloses an extreme diversity in the views of the various senators; and shows further that some of those who expressed themselves with respect to the bill in question had no very clear idea of its effect.

Mr. Miller of New York, who at first objected to the amendment inserting the words "incurred without his personal consent and privity," later conceded (page 36 of petitioner's brief) that a shipowner would, as a matter of course, "be held liable under the law" for any wrong or negligence of his own.

Mr. Conger (page 37 of petitioner's brief), assumed that the interest to which the shipowner's liability would be limited was his interest in the value of the vessel before the damage was committed—an impression squarely contrary to the interpretation given to the Acts of 1851 and 1884 by the courts.

Mr. Vest explained that "the intent is to protect the shipowner when the captain is in control of the ship thousands of miles away"; and in reply to an inquiry by Mr. Miller of California, as to why the existing provisions of the Revised Statutes were not sufficient, Mr. Vest said: "It does not apply to contracts at all, only to torts." Furthermore, the Congressional Record, imme-

diately following the last remark of Mr. Vest (quoted on page 38 of petitioner's brief), shows that Mr. Frye's proposed amendment was put to vote and adopted by a large majority. Accordingly, the net result of all the debate quoted in the appendix to petitioner's brief was the adoption of the very qualification which was contained in the Act of 1851 and which the petitioner claims Congress did not intend to carry forward into the Act of 1884. The remaining quotations from the Congressional Record appended to the petitioner's brief, cast absolutely no light on the reasons why Mr. Frye's amendment was finally abandoned in conference. The only reasonable presumption is that it was considered unnecessary, as the courts have since held.

The emphasis laid by the petitioner on section 30 of the Act of June 26, 1884, is wholly unwarranted. This section merely contains the ordinary formal language commonly added at the end of similar statutes, and can have no material bearing on the interpretation of the Act. It is well settled that

> "when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both."

Frost v. *Wenie,* 157 U. S., 46, at p. 58.
U. S. v. *Lee Yen Tai,* 185 U. S., 213, at pp. 221, 222.

The petitioner's argument is wholly unsupported by authority. The only suggestion of such authority is contained in the following passage in petitioner's brief (page 24):

> "Quite recently, it has been suggested (*The Benjamin Noble,* 244 Fed., 95), that the Act of 1884 was a complete enactment in itself and repealing the Act of 1851, covers the whole subject of limitation of liability of a ship-owner for torts and contracts on land and sea."

An examination of the opinion in the case of *The Benjamin Noble*, discloses that the suggestion in question was made by counsel and promptly overruled by the Court, which said:

> "It is stated that this question is pending in the Supreme Court in the case of Benner Line *v.* Pendleton, *supra;* but we are disposed to follow the decision in the Great Lakes Towing Case" (p. 100).

For more than a quarter of a century, the two Acts under consideration have been considered *in pari materia,* and the Act of 1884 has been repeatedly construed as subject to the same qualifications expressed in the Act of 1851. In the present case, it did not occur to the petitioner to question this well settled construction of the Act of 1884, until the case reached this Court. Having failed on all other issues, he now seeks to reverse a series of decisions so numerous and unanimous that he apparently deemed it useless to question them in the lower courts.

If there is anything in the doctrine of *stare decisis,* we submit that it should be applied in the present case.

If the Court were disposed to reconsider this question, it would not fail to test the petitioner's contention by considering the results to

which it might lead. The owner of a small interest in a yacht, when navigating her personally, might wantonly sink with her another craft of far greater value, and escape all liability beyond the amount of his small individual interest.

This petitioner might have sent the *Edith Olcott* out to sea with full knowledge of her unseaworthy condition, and with the deliberate purpose to destroy her cargo; and yet he would be immune from liability. Indeed, if Section 18 of the Act of June 26, 1884, were to be literally construed, the master of a vessel in which he owned a small interest might, with impunity, misappropriate a cargo worth many times her value. The effect of the Act, if construed literally, would be to create a privileged class of persons embracing all those who owned any interest in vessels.

In another aspect, however, this class of persons would be subject to a serious disability. They would be unable to make a valid contract by the terms of which they assumed any liability beyond the value of their interest in the vessel. The owner of a vessel, in consideration of a high freight rate, might wish to make an agreement with the shippers of cargo that he would carry insurance on the cargo. Such an agreement, however, would be invalid beyond the value of his interest in the vessel. Similar cases might be multiplied indefinitely.

Once it is decided that the petitioner's right to a limitation of liability is dependent upon the absence of any "privity or knowledge" on his part, the case becomes comparatively simple. As we have already pointed out, the petitioner

was the managing owner of the vessel, and he personally signed the contract. The fact that he signed it in the name of the partnership, of which he was a member, as "agent" for himself, certainly cannot affect his relation to the contract. As pointed out by the Circuit Court of Appeals (fol. 482).

> "As the respondent, the principal owner of the vessel, personally signed it (the charter party) as his own agent, he bound himself."

Accordingly, this is a case where the managing owner of a vessel personally negotiated and signed a contract which expressly provided that the vessel should be seaworthy. The vessel was not seaworthy. The case, therefore, presents a very narrow issue, i. e., what is a "personal contract" within the meaning of the decisions holding that a ship owner cannot limit his liability upon his own personal contract? The leading cases on this subject are *Great Lakes Towing Company* v. *Mills Transportation Company* (155 Fed. Rep. 11), decided by the Circuit Court of Appeals for the Sixth Circuit, and *The Loyal* (204 Fed. Rep. 903), decided by the Circuit Court of Appeals for the Second Circuit.

In the Great Lakes Towing Company case a petition for limitation of liability was filed by the Mills Transportation Company which had made a contract with a Towing Company, whereby the said Towing Company agreed to perform all towing and wrecking services required by the vessels of the petitioner at certain stated prices. One of petitioner's vessels

having stranded, the Towing Company was called on, pursuant to the said contract, and sent a tug with wrecking apparatus to the assistance of the stranded vessel, where it spent several days in pumping and attempting to get her afloat, but without success. The stranded steamer having become practically a total loss, the petitioner claimed the right to limit its liability to the small salvage recovered from the wreck. The limitation was denied. The Circuit Court of Appeals held that the Act of 1884 was intended merely as a supplement to the Act of 1851. After stating certain reasons which supported its conclusion, the Court said (at pages 15, 16):

> "But we think there are other reasons of sufficient weight to lead to the conclusion that the act of 1884 was not intended to have application to liabilities of the owners of vessels for the consequences of their personal faults or of obligations personally contracted by them. The purpose of Congress, was, as we think, to relieve the shipowner from the consequences of those extraordinary risks which were imposed without limitation by the law of the admiralty as that law had been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contracts; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation

to the ship, and not those liabilities whether for torts or from contracts, which spring from his own personal conduct or stipulations. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about any thing else and would be enforced in the courts in common-law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value.''

In the case of *The Loyal*, a Lighterage Company contracted to do all the lighterage for an importer for a fixed period of time. Because of the unseaworthiness of one of the lighters, her cargo was endangered and was rescued by salvors who thereby became entitled to salvage compensation. The owner of the cargo impleaded the Lighterage Company, which sought to limit its liability to the value of the lighter. The Circuit Court of Appeals for the Second Circuit held that the contract was the personal contract of the Lighterage Company; that the implied warranty of seaworthiness contained in the contract was equally personal; and that the Lighterage Company could not limit its liability for breach of this warranty.

In the course of its opinion the Court said (at page 932):

''A vessel-owner is not entitled to limit his liability upon his personal contracts. The distinction between those contractual obligations which the owner of a vessel assumes

himself by entering into them and those which are imputed to him for the acts of others on account of his ownership of the vessel, is well settled and is clearly pointed out in the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transp. Company,* 155 Fed., 11, 16, 83 C. C. A., 607, 612" (22 L. R. A. (N. S.) 769." * * *

"The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, just as much the personal contract of the vessel-owner as the express contract itself. It was precisely as if written in the contract. The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others."

In *The Loyal* case, Judge Ward, although concurring in the result, dissented from the reasoning by which the majority of the court reached the conclusion that the vessel owner could not limit its liability upon the implied contract of seaworthiness. His dissent, however, appears to have been based solely upon the ground that the warranty of seaworthiness was implied and was not expressed in the contract. Judge Lacombe appears to have felt some difficulty on the same ground. In this case, however, the contract to make the vessel seaworthy is express, and such difficulty as may have been presented in *The Loyal* does not exist here.

The same may be said of *Quinlan* v. *Pew* (56 Fed. Rep., 111), from which Judge Ward quotes in his opinion in *The Loyal.* The only question which the court had before it in that case related

to an implied warranty of seaworthiness; and the language of the court was directed to such a warranty. While *Quinlan* v. *Pew* is perhaps inconsistent with the decision in *The Loyal,* it is not an authority in favor of the petitioner in the present case. Even if the Circuit Court of Appeals for the First Circuit had attempted to decide the present question in *Quinlan* v. *Pew,* its remarks would have been mere *dicta;* but it sufficiently appears from the opinion that the court did not intend to pass upon that question. The following extracts from the opinion are significant under this head:

> "Whether, where the owner undertakes personally to do this duty, he is to be charged for the lack of the extremest care possible, or takes the hazard of overlooking some things which the utmost scrutiny might discover, or whether acting with ordinary good faith, he will be relieved, provided the defect in question did not come to his attention, we are not now required to determine.
>
> * * *
>
> "That there may be certain contracts, relating not so much to the navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may be well contended, without at all touching the principles here involved."

The history of the case of *Great Lakes Towing Company* v. *Mills Transportation Company* has an important bearing upon the present issue. An application for certiorari was denied by this Court (207 U. S., 596). Thereafter the case was cited with approval by this Court in the case

of *Richardson* v. *Harmon* (222 U. S., 96, at p. 106). It is significant that the opinion of this Court in the latter case was written by Mr. Justice Lurton, who, as one of the Judges of the Circuit Court of Appeals for the Sixth Circuit, took part in the decision of the *Great Lakes Towing Company* case. In view of this fact it may be assumed that Mr. Justice Lurton had in mind not only the decision in the *Great Lakes Towing Company* case, but the principles which the Court there laid down in the course of its opinion. If there were any doubt on this point, however, it would be removed by the following extract from the opinion of this Court, which follows immediately after the sentence in which the *Great Lakes Towing Company* case is quoted (p. 106):

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect *and contracts.*"*

It is perfectly plain from the foregoing quotation that this Court has considered and passed upon the very question involved here. The most that can be said is that the point was not strictly necessary to the decision in the case then before the Court.

Even in the absence of authority, however, it seems perfectly clear that the breach of the owner's contract in this case cannot be said to have occurred

*The italics are our own.

"without the privity or knowledge of such owner or owners."

The fact that the owner has personally entered into the contract to make the vessel seaworthy is sufficient to establish his privity; and if privy to the undertaking, he is necessarily privy to the breach thereof. The law affords no standard of diligence by which the owner's obligation may be measured; having personally contracted to make his vessel seaworthy, he can plead no excuse short of legal impossibility.

That Judge Noyes had this principle in mind in deciding the case of *The Loyal,* clearly appears from the following extract from his opinion (pages 932, 933):

> "The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others. It was a contract from which the owner could not obtain immunity by the limitation statute, and this whether the breach of the contract was caused by the owner's acts or those of its agents. *We are unable to accept the contention that a vessel-owner may be relieved from responsibility upon his personal contracts provided he does not break them himself. The making of the contract is enough to place it outside the statute."**

It is deemed unnecessary to discuss the earlier decisions—all of which are cited and considered in the opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Great Lakes Towing Company* case.

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*The italics are our own.

It may be pointed out, however, that the principle upon which the respondent relies is by no means novel. As early as 1888 Judge Brown said, in *The Amos D. Carver* (35 Fed. Rep., 665, at page 669):

> "The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not, I think, restrict the liability of owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner's express intervention."

Judge Brown steadily adhered to this view and applied it in numerous later decisions. So far as we are aware, the interpretation given to the statute by Judge Brown has never been seriously questioned by any Court; and *The Amos D. Carver* has now been cited with approval by this Court in *Richardson* v. *Harmon* (*supra*).

The question whether the principle laid down in the *Amos D. Carver* with respect to express contracts, and uniformly followed by the courts since that time, is applicable to implied warranties, is not involved here. That question depends upon very different considerations from the question presented in the present case. In the present case the petitioner signed an express and unqualified agreement to make the *Edith Olcott* seaworthy. If he desired to qualify that agreement he should have done so by inserting an appropriate provision in the charter party. It is really idle to suggest that the present case involves any fundamental prin-

ciple affecting the future of American shipping interests. The present case arises from the fact that the petitioner neglected to insert in his charter party an appropriate provision substituting the obligation of due diligence for the absolute obligation to furnish a seaworthy ship. There are forms of charter party in common use, which contain elaborate provisions fully protecting the shipowner from any liability for latent defects; and the petitioner's misfortunes arose from the fact that he signed a form of charter party which did not afford him the protection to which he now claims that he was entitled. There is no particular equity in the petitioner's demand that the Court, by a strained construction of the law, should afford him the protection for which he failed to stipulate in his contract.

The petitioner's claim is especially lacking in merit by reason of the fact that the charter party upon which this suit is brought was written on a printed form supplied by the petitioner himself. (Record, fol. 18.)

POINT II.

This action was properly brought by the respondent as bailee of the cargo of the "Edith Olcott."

The second point of petitioner's brief really raises a question of fact which has been decided adversely to him by both of the lower courts. Both of these courts found as a fact that the respondent was the bailee of the cargo of the

schooner *Edith Olcott* and entitled to sue as such for the benefit of the underwriters, who had become subrogated to the rights of the cargo owners. (Opinion of District Court, Record, fol. 449; Opinion of Circuit Court of Appeals, Record, fols. 470, 471.)

Indeed, it is difficult to see how any other conclusion could have been reached on the evidence.

The respondent, as appears by the evidence of Mr. Callaghan, maintained more or less regular sailings to Porto Rico, and held itself out to the public as a common carrier; it advertised for and solicited cargoes, and when a sufficient amount was obtained, it chartered vessels to transport them; it provided the dock to which the cargo was delivered, and employed men to put the cargo aboard the vessel; it fixed the freight rates and received the freight upon the shipments; it provided its own form of bill of lading, which, in the ordinary course, was signed at its office by the master or agents of the vessel; the entire space of the vessel was chartered to the respondent, and no one could put goods aboard excepting by virtue of a previous contract of affreightment with it. Petitioner's answer admits (Articles I and V), that respondent is a carrier and that the cargo was received "from the libellant."

In view of these facts, it is difficult to see how it can even be suggested that the respondent was not the lawful bailee of the cargo which had been entrusted to it by numerous shippers. These shippers did not know the owners of the schooner in any way; they knew only the Benner Line, with whom they had made their arrangements for the carriage of their goods.

The right to sue under such circumstances has been constantly upheld in the Admirality Courts, which have shown the utmost liberality in allowing suits in a representative capacity. The case of *The New York* (93 Fed. Rep., 495, affirmed 113 Fed. Rep., 810), arose on facts almost identical with those of the present case, and is an authority squarely in point. In that case Judge Thomas said (at page 499):

> "The carrier is so far the representative of the owner of the cargo that he may sue in his own name for injury to the goods carried. The extent to which this rule may be applied is illustrated in *The Beaconsfield*, 158 U. S., 303, 307, 15 Sup. Ct., 860. Therefore, where the cargo owners may maintain an action *in rem* against the carrying ship, the charterers, who are related to the cargo as carriers, may enforce the lien by an action *in rem*. From this there seems to be no logical escape."

(It may be pointed out that the foregoing language refers to the facts of the particular case before the court, and was not intended to limit the doctrine there announced to actions *in rem*. It is, of course, well settled that a carrier may sue as bailee in common law courts where actions *in rem* are unknown.)

In the case of *The Beaconsfield* (158 U. S., 303), this Court said (at p. 307):

> "It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried."

The suggestion made by the petitioner in the closing paragraph of his brief appears to have been passed upon in the case of *The St. John* (7 Blatchf., 220; Fed. Cas. No. 12,224, aff. 154 U. S., 586), where the Circuit Court for the Second Circuit said:

> "The right of a carrier to maintain an action for damage done to goods in his care, and for the safe and sound delivery of which he is responsible, cannot be questioned. He has such right even at common law, on strict principles. Here, if the claimants deemed themselves entitled to insist that the owners not yet satisfied for their loss should be made parties, they should have sought such relief earlier. On appeal, no such objection will be entertained. Even the master of a vessel is permitted, in admiralty, to proceed for a collision."

In the present case, if the petitioner had raised the point that the cargo owners should be made parties to the suit, there would not have been the slightest objection, excepting on the ground of trouble and expense. On the contrary, petitioner confined himself to denying, in his answer, that the respondent was a bailee, and on this issue he has completely failed. The evidence certainly leaves no doubt that the Benner Line was a bailee of the cargo and responsible for it to shippers.

It is confidently submitted that the right of the respondent to sue on the facts shown in the present case could be established in any Court, whether State or Federal:

> *Hardman* v. *Brett* (37 Fed. Rep. 803, at pp. 804, 805);
>
> *National Surety Company* v. *United States* (129 Fed. Rep. 70, at page 73);

The Nonpariel (149 Fed. Rep. 521);
United States v. *Atlantic Coast Line R. Co.* (189 Fed. Rep. 770, at page 784).
U. S. Fidelity & Guaranty Company v. *United States* (229 Fed. Rep. 397).
Deford v. *Seinour,* 1 Ind., 532;
Merrick v. *Brainard,* 38 Barb. (N. Y.), 574;
Great Western R. R. Co. v. *McComas,* 33 Ill., 186;
Galveston, etc., Ry. Co. v. *Barnett,* 26 S. W. Rep., 782 (Tex.);
Owners of Steamboat Farmer v. *McCraw,* 26 Ala., 189;
Freeman v. *Birch,* 28 E. C. L., 543;
The Torgorm, 48 Fed. Rep., 584;
Swift, et al. v. *Pacific Mail S. S. Co.,* 106 N. Y., 206;
Fry v. *Carter & Howell,* 25 Ala., 479;
Moran v. *Portland Steam Packet Co.,* 35 Maine, 55;
Southern Express Co. v. *Heber Craft,* 49 Miss., 480;
Colvin v. *Fargo,* 47 Misc. (N. Y.), 642.

A bailee can recover the full value of the bailed property from a wrongdoer, irrespective of the extent of the bailee's liability.

U. S. Fidelity & Guaranty Company v. *United States* (*supra*).

The weakness of petitioner's position is well illustrated by his argument that "the vessel of the defendant was the bailee of the cargo—there were not two bailees at the same time." Both

of the statements contained in this sentence are unsound.

No inanimate object can occupy the position of a bailee, which is a relation involving trust and confidence; and vessels are no exception to this rule.

The implication that there could not be two bailees of the same property at the same time is equally fallacious. Express companies and other forwarders frequently ship goods entrusted to them over the usual railroad and steamship lines, taking an ordinary bill of lading, like any other shipper. In such a case, the express company or forwarder is the bailee of the property as to the original shipper; while the railroad company or steamship line is the bailee of the property as to the express company or forwarder. We do not see, however, that this question has any bearing on the present case, as here there was only one bailee, *i. e.*, the Benner Line. Neither the schooner *Edith Olcott* nor this petitioner was the bailee of the property in any sense of the word.

The suggestion that the shippers might make some claim against the petitioner under the bills of lading is wholly without merit—quite apart from the fact that the statute of limitations has run against any such claim. It is undisputed that the underwriters, who requested this suit, have paid for the cargo and thereby became subrogated to the rights of the owners of the property. Accordingly, any action brought by the owners of the property could be brought only for the benefit of the very underwriters whose claims will be satisfied by the payment of the judgment in this case.

"Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrong-doer, discharges the latter from all liability to the owner. White *v.* Webb, 15 Conn., 305; Smith *v.* James, 7 Cow. 328; Harker *v.* Dement, 9 Gill. 7."

Hardman *v.* Brett (*supra*).

The bills of lading, of course, were not negotiable instruments in the sense that a transfer of these documents would cut off any equities existing in favor of the persons who issued them. Accordingly, no purpose would have been served by making all of the shippers, consignees and underwriters, who might be interested, parties to this suit; and no such suggestion was made in the petitioner's answer or in the courts below. The addition of these parties would very much have increased the trouble and expense of the trial; and for this reason, the suit was brought in the name of the bailee who had the custody of the cargo and who made the contract for its transportation.

The fact that the petitioner did not personally sign the bills of lading is immaterial. In ordinary course, the bills of lading would have been signed by the master, and in signing them the master would have been acting as the agent of this respondent, and not of the vessel owner, whose rights and obligations were defined in the charter party. The charter party expressly provides, "the bills of lading to be signed without prejudice to this charter." The obvious meaning of this provision was that the charterer might make any contract he saw fit with the

shippers; but that these contracts should not affects the rights and obligations of the vessel owner.

It is deemed unnecessary to discuss this question at length, as the only point definitely raised by the petitioner in this connection appears to be that the respondent was not the bailee of the cargo—a question of fact which has been decided in favor of the respondent by both of the lower courts.

POINT III.

The decrees of the Circuit Court of Appeals herein should be affirmed.

Dated, New York, January 12, 1918.

Respectfully submitted,

Harrington, Bigham & Englar,
Proctors for Respondent.

D. Roger Englar,
Advocate.